UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ALLE-KISKI MEDICAL CENTER	Cases 6–CA–32751 6–CA–32867
and	6–CA–33302 6–CA–33259
UNITED FOOD AND COMMERICAL WORKERS INTERNATIONAL UNION, LOCAL 23, AFL-CIO	

Clifford E. Spungen, Esq., for the General Counsel.
E. Donald Ladov and Leslie D. Heller, Esqs. (Cohen & Grigsby, P.C.), of Pittsburgh, Pennsylvania, for the Respondent.
Vincent C. Longo, Esq., of Canonsburg, Pennsylvania, for the Charging Party.

DECISION

Statement of the Case

Arthur J. Amchan, Administrative Law Judge. This case was tried in Pittsburgh, Pennsylvania on June 10, 2003. The charges were filed between May 28, 2002 and February 24, 2003 and the final consolidated complaint was issued May 22, 2003. The General Counsel alleges that Alle-Kiski Medical Center violated Section 8(a)(3) and (1) of the Act by refusing to grant merit wage increases to bargaining unit members that it had granted to employees not in the bargaining unit. The General Counsel also alleges that Respondent violated the Act in not offering life insurance and disability insurance coverage to unit employees, while offering such coverage to non-unit employees. Finally, the General Counsel alleges that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to notify the Union of any proposed changes in the conditions and terms of employment of unit employees and unilaterally implementing a policy forbidding employees from wearing their ID badges within the hospital when not on duty.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

Findings of Fact

I. Jurisdiction

Respondent, Alle-Kiski Medical Center, a corporation, operates the Allegheny Valley Hospital in Natrona Heights, Pennsylvania, from which it annually receives gross revenues in excess of $250,000, and annually purchases and receives goods valued in excess of $50,000 from outside of the Commonwealth of Pennsylvania. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, the United Food and Commercial Workers International Union, Local 23, is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

The Organizing Campaign, Election, Exceptions and Certification of the Union

In 2001 and 2002, the Union conducted an organizing campaign among certain non-professional service employees of Respondent. As a result of charges filed by the Union during the campaign, the Board found that Respondent violated the Act by conducting unlawful surveillance of employees engaged in union activity on two dates in 2001, unlawfully confiscating union literature from an employee on one occasion and issuing a disciplinary warning for violation of an overly-broad no-solicitation/no distribution rule, *Alle-Kiski Medical Center,* 339 NLRB No. 44 (June 23, 2003).

In a representation election conducted on April 4, 2002, the Union received a majority of the valid votes cast. Respondent filed "Objections to Conduct Affecting the Results of the Election" on April 10, 2002. Specifically, Alle-Kiski alleged that a March 26, 2002 letter sent to employees by a member of the Pennsylvania House of Representatives destroyed the requisite laboratory conditions for the election. The company alleged that this letter, written on the representative's letterhead, and sent at the Union's behest, misled employees into believing that there were voting "on having a collective bargaining agreement," rather than merely the selection of a collective bargaining representative.

On April 30, 2002, the Acting Regional Director recommended that Respondent's objections be overruled in their entirety. Respondent filed Exceptions with the Board to the Acting Regional Director's report on May 13, 2002. Ten months later, on March 21, 2003, the Board adopted the Acting Regional Director's findings and recommendations and certified the Union. Thereupon, Alle-Kiski recognized the Union and agreed to bargain with it. As of June 10, 2003, the date of the instant hearing, contract negotiations had not begun.

Respondent's conduct while its Exceptions to the Acting Regional Director's Report were pending before the Board

A merit wage increase is granted to non-unit employees, but not to unit employees

On May 9, 2002, the Union requested that Alle-Kiski bargain with it over any changes Respondent intended to make in the terms and conditions of employment of unit employees. Respondent, through counsel, advised the Union on May 21, 2002 that it would not recognize, meet or bargain with the Union until the Board or a Court of Appeals rendered a decision on Alle-Kiski's objections to the Acting Regional Director's report on the election. Respondent also stated that it would not inform the Union of any changes it might propose in the terms and conditions of unit members' employment while its objections to the election were pending (GC Exh. 13).

Between April and June of 2002, Respondent conducted performance appraisals for all its approximately 1300 employees, including the approximately 500 employees in the bargaining unit. In June, Alle-Kiski's Board of Directors approved a wage increase for fiscal year 2003 (July 1, 2002 through June 30, 2003) for all employees who received ratings of "good" (a 3% increase), "outstanding" (a 4% increase), or "distinguished" (a 5.25% increase). Over ninety-eight percent of unit employees would have received a wage increase had Respondent given the merit increase to all employees at the hospital. Less than 2% of employees, those who received a rating of "below expectations," would not receive a wage increase. Those rated as

"needs improvement" would be eligible for an increase in January 2003 provided their next appraisal (to occur within six months) was satisfactory.[1]

Employees outside of the bargaining unit received this merit wage increase; bargaining unit employees did not. Respondent told bargaining unit employees that it was maintaining the status quo while its objections were pending, or that wage increases "were a bargaining issue with the Union," or that increases would be determined through negotiation if the Union were certified. At least some managers told employees that if the Union was not certified there would be a second election. Respondent said nothing about what would happen regarding the wage increase if a second election was conducted.

On August 19, 2002, the Union wrote the following letter to Respondent's Administrator:

> Please be advised that UCFW Local 23 does not oppose any legally scheduled wage increases due the Unit Employees who were part of the April 4, 2002 National Labor Relations Board Election. The Union will not file a board charge against the Administration for implementing the wage increases that were due the employees in July. We also request that any increases considered by the Administration should be retroactive to the date of the employee's performance evaluation.

Respondent responded to this letter on September 4, 2002, stating that it considered the letter to "be part of the collective bargaining process." Implicit in the response was Alle-Kiski's position that it was not required to grant the merit increases to unit employees while its exceptions were pending. Also implicit is its position was that it was not required to ever grant these increases in the event that the Union was certified.

Local 23 President Ronald Kean wrote another letter to Respondent on September 10 stating that:

> …The Union will <u>not</u> file a Board Charge against the hospital administration for implementing the wage increases that were due the bargaining unit employees for fiscal year 2003, <u>nor will the Union file a Section 8(a)(5) charge for implementing a new "service excellence" criterion in evaluating employees.</u>[2] The Union requests that the wage increases be retroactive to the date of the employees' performance evaluation.

Voluntary Insurance Policies are offered to non-unit employees, but not to unit employees; health insurance premiums are increased for non-unit employees only.

On October 16, 2002, Respondent offered non-unit employees the opportunity to purchase a voluntary universal life insurance policy and voluntary short-term disability insurance

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[1] Prior to 2002, Respondent rated employees in only three categories: outstanding, good and "needs improvement."

The General Counsel apparently concedes that the granting of wage increases based on merit was not an "established past practice," which Respondent could have implemented even in the face of pending objections to conduct affecting the election (Tr. 34).

[2] This refers to the expansion of performance categories (good, outstanding, etc.) from three to five.

policy. This offer was not conveyed to unit employees (R Exhs. 1, 2). At the same time Respondent informed non-unit employees that their cost for medical benefits would increase. Unit employees were informed that "before final resolution of the representation election for your employee group, employee contributions will also remain the same as those for 2002."

Respondent issues a policy regarding the wearing of ID badges within the hospital when employees are not on duty

On December 23, 2002, Respondent, without prior notice to the Union, issued a policy entitled "Unauthorized Personnel in Patient Care and Working Areas." The policy (GC Exh. 18) states that:

1. Unauthorized personnel are not permitted in patient care areas or in working areas of the hospital. Employees at AKMC and employees from other Western Pennsylvania Allegheny Health Systems (WPAHS) hospitals are **not** permitted to wear their hospital ID badge within the hospital when they are not on duty.

2. Any person who misrepresents themselves by wearing a hospital ID badge while on hospital property will be asked to remove the name badge and will be asked to leave the patient care or work area.

The policy states further that persons from other hospitals, not on official business will be treated like other non-employee visitors and that any individual not authorized to be on hospital premises will be considered a trespasser and will be asked to leave. It concludes by stating that, "Security will be notified, as necessary to request unauthorized personnel to leave the hospital premises."

Prior to the issuance of this directive, at least some unit employees had never been informed that they must remove their ID badge if they stayed at the hospital after the end of their shift to, for example, visit a patient. While Respondent asserts the policy is not a material change to the terms of employment of unit employees, these employees could be subject to discipline for not adhering to this policy. There is no evidence that any employee had been disciplined prior to December 23, 2002, for failing to remove his or her ID badge while off duty on the hospital's premises.

Analysis and Conclusions of Law

The merit wage increase

An employer is generally required to grant wage increases while a representation petition, or objections to an election, remain pending as if the petition or objections had never been filed. Where the employer's past practice is haphazard, the employer may lack objective evidence to substantiate its claim that the increases it gave are the same as they would have been in the absence of the petition. Accordingly, the board has fashioned a limited exception to the employer's general duty to act as if the petition had not been filed. Generally, an employer may withhold wage increases provided that it tells its employees that it has merely postponed or deferred the increases to avoid the appearance that it interfered with the election, *Pennsylvania Gas & Water Co.,* 314 NLRB 791, 792-3 ((1994).

Respondent contends that it was entitled to withhold the merit wage increase from bargaining unit employees because had it given the increase, it would have violated Section

8(a)(5) and (1), *Mike O'Conner Chevrolet,* 209 NLRB 701, 703-4 (1974). However, I find this argument has no merit in view of the Union's August 19, and September 10, 2002 letters. These letters constitute the requite consultation with the Union that would have immunized Respondent from any unfair labor practice charge.

An employer generally may satisfy his obligations by telling unit employees that such benefits are to be deferred pending the outcome of the election or objections. This alternative is accorded to employers in order to avoid interference with the employees' decision as to whether or not to select a collective bargaining representative, *Kauai Coconut Beach Resort,* 317 NLRB 996,997 (1995). However, in the instant case, where the Union sanctioned the granting of the increase, Respondent did not have to worry about interfering with its employees' choice, and could only satisfy the requirements of the Act by granting the merit increase. Moreover, there is no justification for Respondent's refusal to grant the wage increase retroactively once the Union had been certified on March 21, 2003.

When an employer is in the process of negotiating a comprehensive collective bargaining agreement with a union, it does not violate the Act by withholding a wage increase from bargaining unit employees which it has granted to non-unit employees, *Shell Oil Co., Inc.,* 77 NLRB 1306 (1948). However, when Alle-Kiski withheld the July 2002 merit wage increase from bargaining unit employees, it was also refusing to bargain with the Union. When an employer withholds a benefit from unit employees that it has granted unorganized employees, while at the same time, refusing to bargain with their union, the employer violates Section 8(a)(1) of the Act, *The B. F. Goodrich Co.,* 195 NLRB 914, (1972); *L. M. Berry and Company,* 254 NLRB 42, 44 (1981).[3] The fact that Respondent belatedly began negotiations with the Union does not cancel its statutory violation, which commenced on July 1, 2002.

Respondent also violated Section 8(a)(1) in not informing unit employees in October 2002 that it was merely postponing its offer of voluntary insurance policies to unit employees until its objections to the election were resolved.

For the same reasons that apply to the merit wage increase, Respondent violated Section 8(a)(1) in not telling unit employees that it was merely postponing its offer of voluntary universal life insurance coverage and short-term disability insurance coverage until its objections to the election were resolved. Unlike the merit wage increase, Alle-Kiski never received assurance from the Union that would not file an unfair labor practice charge if it offered these benefits to unit employees. Thus, Respondent was justified in delaying this benefit until the resolution of its objections. However, once the Union was certified, Respondent was required to offer this benefit, since it had not been bargaining with the Union between October 2002 and March 21, 2003.

Alle-Kiski notes that while it did not offer the insurance benefit to employees, it also did not raise their health insurance premiums consistent with such increases for non-unit employees. Respondent could have told unit employees that the premium increase was also

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[3] I have not relied on *Noah's Bay Area Bagels, LLC,* 331 NLRB 188 (2000), a case extensively discussed by both parties. In that case, the Board held that the employer could have established that there was a persuasive business reason demonstrating that the time of the announcement or grant of benefits was governed by factors other than the union campaign. I do not think it has been established that Respondent in this case could have made such a showing until its receipt of the Union's August 19, 2002 letter.

being deferred due to the pendency of its objections and is entitled to increase this premium retroactively to the date when the premiums were increased for non-unit employees.

Respondent violated Section 8(a)(5) and (1) in May 2002 by refusing to meet and bargain with the Union and refusing to notify it of any changes in the terms and conditions of employment of bargaining unit members

It is controverted that on May 21, 2002, Respondent rejected the Union's request that Respondent meet and bargain with the Union and notify the Union if it intended to make any changes to the terms and conditions of unit members' employment. An employer, which rejects such requests from a union that is ultimately certified, does so at its peril. The duty to bargain and provide requested information arises as soon as a union is elected bargaining representative—even though a request to bargain, or for information is made prior to certification and while objections are pending, *The Developing Labor Law,* Volume 1, 4th edition, Chapter 13, IV, C at page 889 and n. 720 (2001); *Pony Express Courier Corp.,* 286 NLRB 1286 (1987). Respondent's rejection of the Union's requests in May 2002 thus violated Section 8(a)(5) and (1) of the Act,

Respondent violated Section 8(a)(5) and (1) in implementing a new policy forbidding the wearing of ID badges while off-duty.

Respondent concedes that it did not notify or offer the Union an opportunity to bargin with it over the issuance of the ID badge policy that was communicated to unit and non-unit employees in December 2002. Alle-Kiski contends it was not required to do so, because 1) this was not a change in policy and 2) the policy has no material effect on the terms and conditions of employment of unit employees.

I conclude that the December 2002 policy was a change in the terms and conditions of employees, in that at least some employees had never been told that they were not allowed to wear their ID badges in the hospital if they were off duty and there is no evidence that such a policy was enforced at the hospital prior to December 2002. Further, I conclude that the policy is a material change in unit employees' working conditions in that there is at least an implicit threat of disciplinary action if unit employees are found wearing their ID badge at the hospital while not on duty. Given the potential or disciplinary action, I find that Respondent violated Section 8(a)(5) and (1) in making this change without notifying the Union and giving it the opportunity to bargain over this policy, *Bridgestone/Firestone, Inc.,* 337 NLRB No. 20 (2001) slip opinion at pp. 2 and 7.

Summary of Conclusions of Law

1. Prior to receipt of the Union's August 19, 2002 letter, Respondent violated Section 8(a)(1) of the Act in failing to inform unit employees that merit wage increases were merely being postponed due to its pending objections and that they would receive this increase retroactively once these objections were resolved;

2. Since receipt of the Union's August 19, 2002 letter, Respondent has violated Section 8(a)(1) in failing to grant unit employees their merit wage increases retroactively to July 1, 2002;

3. Between October 16, 2002 and March 21, 2003, Respondent violated Section 8(a)(1) in not informing unit employees that Respondent's offer of voluntary universal life insurance coverage and short-term disability insurance was merely being postponed until the resolution of its objections to the election;

4. Since March 21, 2003, Respondent has violated Section 8(a)(1) in not offering unit employees these insurance benefits;

5. From May 21, 2002 to March 21, 2003, Respondent violated Section 8(a)(5) and (1) by refusing to meet and bargain with the Union and by refusing to notify the Union and offer it an opportunity to bargain over any changes Respondent was proposing in the terms and working conditions of bargaining unit members' employment.

6. Since December 23, 2002, Respondent has violated Section 8(a)(5) and (1) of the Act by implementing and enforcing its policy regarding the wearing of ID badges when employees are off duty.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having unlawfully withheld benefits to bargaining unit employees, Respondent must make them whole for any loss of earnings and any other benefits they may have suffered due to Respondent's violations of the Act, with interest as prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Alle-Kiski Medical Center, Natrona Heights, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withholding from unit employees, merit wage increases, voluntary universal life and short-term disability coverage that it afforded to non-unit employees between July 1, 2002 and March 21, 2003;

(b) Enforcing its policy of prohibiting employees from wearing ID badges while off-duty at the hospital without offering the Union an opportunity to bargain over this policy;

(c) Making any changes in the terms and conditions of unit members' employment without first notifying the Union and offering the Union an opportunity to meet with Respondent and bargain over such proposed changes;

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of this Order, grant bargaining unit employees the merit wage increases to which they are entitled retroactive to July 1, 2002; offer to bargaining unit employees the same universal life insurance and short-term disability insurance benefits that were offered to non-unit employees on October 16, 2002.

(b) Make bargaining unit members whole for any loss of earnings or other benefits suffered as a result of Respondents failure to grant such benefits at the time such benefits were offered to non-unit employees.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its Natrona Heights, Pennsylvania hospital, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 1, 2002.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 15, 2003.

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Arthur J. Amchan
Administrative Law Judge

[5] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT enforce our policy, which prohibits employees from wearing ID badges when off duty at the hospital against bargaining unit employees without notifying the Union and offering the Union the opportunity to bargain over that policy and its enforcement.

WE WILL NOT make changes in the terms and conditions of employment of bargaining unit members without first notifying the Union and offering the Union the opportunity to meet and bargain over such changes.

WE WILL NOT withhold from bargaining unit employees wage increases, universal life insurance coverage, short-term disability insurance coverage and other benefits that we granted to non-unit employees between July 1, 2002 and March 21, 2003.

WE WILL NOT in any like or related manner interfere with, restrain or coerce any of you in the exercise of rights guaranteed by the National Labor Relations Act.

WE WILL offer to bargaining unit employees the same merit wage increases, voluntary universal life insurance coverage and voluntary short-term disability insurance coverage that we offered to non-unit employees between July 1, 2002 and March 21, 2003.

WE WILL make bargaining unit employees whole for any loss of earnings and other benefits suffered as a result of their not be granted the same benefits as non-unit employees between July 1, 2002 and March 21, 2003.

ALLE-KISKI MEDICAL CENTER

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1000 Liberty Avenue, Federal Building, Room 1501, Pittsburgh, PA 15222-4173

(412) 395-4400, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (412) 395-6899.